Diamond L Transportation, Inc. *and* United Container Haulers, Petitioner. Case 16–RC–9555

March 8, 1993

ORDER DENYING REVIEW

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which has considered the Petitioner's request for review of the Regional Director's Decision and Order (pertinent portions of which are attached).[1] The request for review is denied as it raises no substantial issues warranting review.

[1] The only issue raised by Petitioner's request for review was whether owner-operators and drivers who transport containers using tractors leased by the Employer are independent contractors.

APPENDIX

REGIONAL DIRECTOR'S DECISION AND ORDER

The Employer is a contract commercial carrier licensed by the Interstate Commerce Commission (ICC) and the Department of Transportation (DOT) and is engaged in the business of hauling containers to various ports in Houston and Galveston for international shipping. The Employer provides this service by leasing tractors from owner-operators to transport the shippers' containers and trailers from its customers' warehouse and/or factories to port. The Petitioner seeks to represent the owner-operators and drivers who transport the containers using the tractors leased by the Employer. Nine of the 14 individuals in question are owner-operators who drive their own tractors. Three of the five remaining drivers are employed by owner-operators who already drive for the Employer. The other two drivers are employed by Ruth Matthews, who also is employed by the Employer as a dispatcher. Matthews contracts with the Employer to provide two trucks (and drivers) under the same lease agreement used by the owner-operators. The Employer contends that the owner-operators and drivers are independent contractors and thus not employees within the meaning of the Act.

Under the lease agreement between the Employer and the owner of the tractor, the owner is paid 70 percent of the fee received by the Employer from its customer. The Employer makes no FICA or other payroll tax deductions from this amount. The owner-operators receive no vacation, sick pay, or health insurance benefits. As stated above, nine of the tractors leased by the Employer are driven by owner-operators. The owners of the tractors are free, however, to hire other drivers to operate their vehicles. The Employer has no control over the owner's hiring decision other than to require that the driver comply with DOT requirements and meet the Employer's insurance carrier's specifications. The owner negotiates and pays the driver's wages and is responsible for making the applicable FICA, unemployment, and workers' compensation deductions from the driver's paycheck.

The owner-operators and drivers do not run regularly scheduled routes, but call the Employer each morning to see if there are loads available. The contract between the tractor owner and the Employer does not specify any minimum payment from the Employer nor minimum number of trips to be made by the driver. The owner-operator/driver determines the amount of income he will receive from the Employer by the number of trips he is willing to accept. Should an owner-operator be unable or unwilling to accept a load, he may refuse the job without forfeiting his contract. Although the Employer requests that it be given notice that an owner-operator is taking vacation, the owner-operator determines if and when he will take the time off and is not required to provide advance notice to the Employer.

Although DOT regulations require that the Employer maintain files including the operating logs filed by the owner-operators and drivers, the Employer does not determine the routes taken by the drivers, nor does it control the manner or method in which the drivers comply with the DOT rest requirements. Instead the owner-operators and drivers make these decisions based on their own desires and independent judgment. Similarly, the owner-operators are responsible for obtaining any loading or unloading assistance they require and are not reimbursed by the Employer for this expense. The Employer allows the drivers to wear caps bearing its logo which were created for advertising purposes but does not require the drivers to wear the caps or any other type of uniform. Additionally, the Employer has no rules of conduct or disciplinary procedures with respect to the owner-operators or drivers. Although the Employer may request that the owner-operators and drivers behave in a courteous manner to its customers, it does not issue discipline to the driver for failing to do so. Should one of the Employer's customers prohibit an owner-operator or driver from its facility, the Employer does not send that individual to the facility again. However, the Employer does not cancel the owner's lease agreement on this ground but instead will use the owner-operator or driver on other jobs.

The Employer has no ownership interest in the tractors driven by the owner-operators/drivers and is not responsible for maintenance, repair, fuel, licensing, or any other operating expenses. Pursuant to their lease contracts with the Employer, the owners of the tractors are required to obtain all operating permits and licenses required by the Department of Transportation. Although the Employer is obligated under ICC and DOT regulations to provide cargo liability insurance to cover the container and products, the lease contract provides that the owner must establish an escrow account to cover the Employer's deductible. Additionally, the owner is responsible for any addional insurance of the tractor and/or its driver. ICC regulations require that the Employer's placard or logo be placed on the tractor to show that the tractor is being operated under the Employer's license. However, the owner of the tractor may ''trip lease'' the tractor to another carrier provided that the Employer's placard is covered or removed for the duration of the trip. Further, the Employer places no restrictions on the owner-operator's personal use of the vehicle.

The question of whether an individual is an independent contractor or an employee within the meaning of Section 2 (3) of the Act is determined using the common law ''right of control'' test, i.e., whether the party for whom the service is performed has the right to control the ''manner and means'' of performance or whether that party is concerned

only with the final result. This analysis also includes examination of the ''entrepreneurial risk'' undertaken by the party performing the service. *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968); e.g., *Central Transport*, 299 NLRB 5 (1990); *Precision Bulk Transport*, 279 NLRB 437 (1986); *Don Bass Trucking*, 275 NLRB 1172 (1985); *North American Van Lines v. NLRB*, 869 F.2d 596 (D.C. Cir. 1989).

In the instant case, the record reflects that the Employer neither owns nor has financed any of the tractors it leases from the owners, that the Employer does not direct the maintenance, repair, or outside use of the tractors by the owners, and that the employer does not determine the routes or break times chosen by the owner-operators and/or drivers when they are transporting the containers for the Employer's customers. Further, the owner-operators and drivers assume significant entrepreneurial responsibility in their relationship with the Employer as their income is determined by the number of loads they decide to carry as well as their independent decisions regarding maintenance and repair of their vehicles. Unlike the owner-operators and drivers determined to be employees in the unreviewed decision in *International Transfer of Florida*, Case 12–RC–1256 and in the Board's recent decision in *C.C. Eastern, Inc.*, 309 NLRB 1070 (1992), the owner-operators and drivers in the instant case are not subject to any formal or informal disciplinary procedures. Essentially, the control exercised by the Employer over the owner-operators and drivers is limited to that required by DOT and ICC to maintain the Employer's status as a licensed contract carrier. It is well-established that restrictions imposed by government regulations do not constitute actual control or supervision by a putative employer. E.g., *Precision Bulk Transport*, supra; *Air Transit*, 271 NLRB 1108 (1984).

The facts in this case are also distinguishable from those in *C.C. Eastern, Inc.*, supra, in that the owner-operators employed by C.C. Eastern did not bear the same ''entrepreneurial risks'' undertaken by the owner-operators and drivers in the instant case. The *C.C. Eastern* employees drove preassigned routes and were eligible for a yearly bonus based on their performance and disciplinary records. In contrast, the owner-operators and drivers in the instant case call the Employer each morning and are assigned their routes on a ''first come-first served'' basis. An owner-operator can increase his income by ''hustling,'' i.e., making sure he calls in early. Conversely, the owner-operator can choose not to call the Employer for an assignment on any given day with no adverse affect on his contract. Further, while the Board noted that the *C.C. Eastern* owner-operators did not work for other companies or employ other drivers, three of the five non-owner-operator drivers in the instant case are employed by owner-operators who drive for the Employer themselves. The other two drivers are employed by the Employer's dispatcher, who leases her two tractors to the Employer under the same contract used by the owner-operators. The record reflects that the Employer did not participate in hiring any of these drivers and that their payment is negotiated with the owners of the tractors rather than with the Employer.

Based on the foregoing, I have determined that the owner-operators and drivers are independent contractors rather than employees within the meaning of Section 2(3) of the Act.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.